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No. 80-2008

In the

Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS L. GOLDSTEIN, COMPTROLLER OF THE TREASURY OF THE STATE OF MARYLAND; AND STATE OF MARYLAND; THE OVERBROOK EGG NOG CORPORATION, A MARYLAND CORPORATION; AND HEUBLEIN, INC., A CONNECTICUT CORPORATION,

Petitioners,

vs.

G. WILLIAM MILLER, SECRETARY OF THE TREASURY AND G. R. DICKERSON, DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

Respondents.

REPLY OF PETITIONERS TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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ARGUMENT

Contrary to the assertion of the respondent, the issue presented for review has not been rendered moot by the promulgation of a temporary regulation permitting the use in intrastate commerce of a 100 milliliter (approximately 3.4 ounces) standard of fill. See 46 Fed. Reg. 3224

(1981). Said regulation is as stated "temporary" and even if made permanent is subject to revocation based upon the administrative discretion of the Secnetary. Thus, in order to resolve the issue of the termination of the business of the petitioner, Overbrook Egg Nog Corporation, it is imperative that not only their right to do business in intrastate commerce be clearly established, but also the authority of the State of Maryland to regulate in intrastate commerce be established.

The adoption of the temporary regulation would not cause any decision that this Court might render in this matter as advisory or without practical importance to the State of Maryland. Just as the Federal Government looks to alcoholic beverages as a source of revenue, it is also a major source for local and State governments.

The State of Maryland, and every other state have been greviously threatened as a result of not only the decision of this case but the manner in which it was reached. In effect said decision means that the Secretary in the exercise of his purported regulatory authority is without any limitations and that the constitutional authority to tax is not limited by the 21st Amendment nor subject to any test where a direct conflict arises.

Respondents contend that the lower court's decision is not in conflict with other decisions of this Court and other courts of appeal. However, to so state is to ignore this Court's and other appellate decisions which have established a balancing test, based upon the competing interests of State and Federal Governments. See *California Retail Liquor Dealer's Association* v. *Midcal*

Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937 (1980); *Castlewood* v. *Simon*, 596 F.2d 638 (1979) (Pet. Cert. Granted Judgment vacated May 20, 1980) remanded to 5th Circuit Opinion Restated 626 F.2d 1200 (10/1/80).

The states have since the repeal of prohibition regulated standards of fill within their borders, whereas the Treasury's authority is limited to interstate commerce under the Federal Alcohol Administration Act. ("F.A.A. Act") 27 U.S.C. Section 201 et seq. Moreover, the petitioners have bottled and sold the metric equivalent of the 4 ounce standard of fill in Maryland since 1954.

It was not until the adoption of 27 C.F.R. 201.540(b) in 1976 that the Secretary prohibited a specific standard of fill and for the first time attempted to regulate the same under the purported authority of 27 U.S.C. Section 5301(a), Internal Revenue Code of 1954, rather than the F.A.A. Act. Thus, it is error for the respondents to imply that the Secretary has had a longstanding interest in the regulation of standards of fill in intrastate commerce.

In addition, to argue that said regulation is necessary for the protection of revenue is to ignore the fact that the tax is assessed based upon gallonage immediately upon its manufacture in bulk, at Heublein's plant in Connecticut, and is paid by Heublein prior to its shipment in bulk to Overbrook Egg Nog Corporation in Maryland where it is bottled, distributed, sold and consumed solely within the State of Maryland.

CONCLUSION

For all of the foregoing reasons, petitioners urge that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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